IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FERA NO.63 OF 2006

M/s.Themis Agencies, a proprietory firm carrying on business at 26, Mahal Industrial Estate, Mahakali Caves Road, Andheri (East), Mumbai 400 093. through its proprietor Dr. Sunil Raman Desai residing at Plot No.2, Bhavanagar House, Ruia Park, Juhu (N), Mumbai 400 049. ..Appellant.

V/s.

Union of India, Directorate of Enforcement, Mumbai Zone, II Floor, Mittal Chambers, Nariman Point, Mumbai - 400 021. ..Respondent.

Mr.Atul Rajdhyakasha with Mr. Kedar Wagle for appellant.

Mr.P.S.Jetly for respondent.

CORAM : DR.S.RADHAKRISHNAN AND J.P.DEVADHAR, JJ.

DATED : 12TH JANUARY, 2007.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. This appeal is filed under section 35 of the Foreign Exchange Management Act,1999 ('FEMA' for short) against the order of the Appellate Tribunal for Foreign Exchange dated 8/6/2006. By the said order, the

Tribunal reduced the penalty from Rs.6,00,000/- to Rs.2,00,000/- which was levied upon the appellant on the ground that the provisions of Foreign Exchange Regulation Act, 1973 ('FERA' for short) were violated. The appeal was admitted on 11th October, 2006 stating therein that 7 questions of law do arise from the order of the Tribunal dated 8/6/2006. Today, when this appeal is taken up for hearing, by consent of the parties the said 7 questions have been reframed into one question as follows:-

> " Whether on the facts and in the circumstances of the case, the Tribunal was justified in sustaining the penalty to the extent of Rs.2,00,000/- for the alleged contravention of section 8(3) & 8(4) of FERA read with section 49(3) and 49(4) of FEMA when admittedly, the goods purchased from the foreign exchange acquired by the appellant have been actually brought into India ?

2. The appellant, prior to its dissolution in the year, 2005 was a Partnership firm engaged in the business of manufacture and sale of Chloramphenicol Palmitate. The appellant was also a trader dealing in bulk drugs like Chloramphenicol, etc.

3. In the year 1998, the appellant obtained foreign exchange from an authorised dealer under the provisions of Foreign Exchange Regulation Act, 1973

('FERA' for short) with a view to import Chloramphenicol from a party in China. At that time, Chloramphenicol was freely importable.

4. Accordingly, on receipt of the foreign exchange the party in China shipped three consignments of Chloramphenicol to India.

5. On arrival of the said goods in March / April, 1998, the appellant filed three bills of entry for warehousing the said goods. The customs authorities permitted the goods to be warehoused and thereupon the said goods were cleared and stored in a godown belonging to the Central Warehousing Corporation ('CWC' for short).

6. Out of the three consignments, the appellant cleared one consignment after filing a bill of entry for home consumption and after paying the assessed customs duty and other charges.

7. It is the case of the appellant that due to financial difficulties the remaining two consignments could not be cleared during the permitted bond period. As a result whereof, the customs authorities / CWC auctioned the said goods in March, 2002.

8. Thereafter, by a show cause notice dated 22nd May, 2002, the Deputy Director, Enforcement Directorate called upon the appellant to show cause as to why the appellant should not be held guilty of violating section 8(3) and 8(4) of FERA as the appellant had failed to submit the Exchange Control copy of the Bill of Entry evidencing import of the goods into India for which the foreign exchange was released. By a letter dated 7/8/2003 the appellant was called upon to produce a certificate from the bank confirming the import of goods along with all other documents. The appellant addressed letters to the Bank and the CWC seeking requisite certificate from them so as to establish that the goods purchased by the appellant by remitting the foreign exchange, have been actually brought into India. As the Bank as well as the CWC did not issue the requisite certificate within a reasonable time, the Deputy Director, Directorate of Enforcement passed an order on 13/7/2004 holding that the appellant has violated the provisions of FERA and imposed penalty of Rs.6,00,000/-.

9. Being aggrieved by the aforesaid order, the appellant filed an appeal before the Appellate Tribunal. At the hearing of the appeal, the appellant

produced the certificate issued by the Bank to establish that the foreign exchange acquired has been utilised for purchase of Chloramphenicol from China and that the remittances have been made to China in that behalf. The appellant had also produced certificate from CWC to establish that the goods imported by the appellant were warehoused in their godown.

10. By the impugned order dated 8/6/2006 the Appellate Tribunal upheld the contention of the appellant that the foreign exchange has been remitted to a party in China for purchasing Chloramphenicol and that the said goods purchased outside India have been brought into India and warehoused. However, the Tribunal held that because the appellant had not cleared the warehoused goods, it is to be presumed under section 8(4) of FERA that the foreign exchange has not been used for the purpose for which it was acquired. The Tribunal held that as the appellant had not cleared the warehoused goods and failed to produce exchange control copy of the bills of entry evidencing clearance of the goods, the import was incomplete. Accordingly, the Tribunal held that the appellant had violated section 8(3) and 8(4) of FERA. However, in the facts and circumstances of the case, the Tribunal reduced the penalty from Rs.6 lakhs to Rs.2 lakhs.

Challenging the said order, the present appeal is filed.

11. Section 8(3) & 8(4) of FERA relevant for this appeal reads thus:-

> 8. **Restrictions on dealings in foreign exchange** -
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> (1) .....
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> (2) .....
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> (3) Where any foreign exchange is acquired by any person, other than an authorised dealer or a money-changer, for any particular purpose, or where any person has been permitted conditionally to acquire foreign exchange, the said person shall not use the foreign exchange so acquired otherwise than for that purpose or, as the case may be, fail to comply with any condition to which the permission granted to him is subject, and where any foreign exchange so acquired cannot be so used or the conditions cannot be complied with, the said person shall, within a period of thirty days from the date on which he comes to know that such foreign exchange cannot be so used or the conditions cannot be complied with, sell the foreign exchange to an authorised dealer or to a money-changer.
>
> (4) For the avoidance of doubt, it is hereby declared that where a person acquires foreign exchange for sending or bringing into India any goods but sends or brings no such goods or does not send or bring goods of a value representing the foreign exchange acquired, within a reasonable time or sends or brings any goods of a kind, quality or quantity different from that specified by him at the time of acquisition of the foreign exchange, such person shall, unless the contrary is proved, be presumed not to have been able to use the foreign exchange for the purpose for which he acquired it or, as the case may be, to have used the foreign exchange so acquired otherwise than for the purposes for which it was acquired.
>
> (5) .....

12. As per section 8(4) of FERA, a person acquiring foreign exchange with a view to bring into India any goods must (a) bring the goods into India within a reasonable time. (b) the goods brought into India must represent the value of the foreign exchange acquired. (c) the goods brought into India must be of the kind, quality or quantity specified by him at the time of acquiring the foreign exchange and if the person acquiring the foreign exchange fails to establish the above criteria, then, it shall be presumed that the foreign exchange has not been used for the purpose for which it was acquired or used for the purposes other than the purpose for which it was acquired.

13. In the present case, it is not in dispute that the foreign exchange was acquired by the appellant to import Chloramphenicol from a party in China and in fact the appellant has purchased Chloramphenicol from a party in China. It is not in dispute that the entire foreign exchange acquired by the appellant has been remitted to China and there is no dispute regarding the value, quality and quantity of the Chloramphenicol imported by remitting the foreign exchange. It is not in dispute that the imported goods were stored in a warehouse and out of the three consignments, one

consignment has been cleared by the appellant on payment of customs duty. Merely because two consignments have not been cleared by the appellant and the same are sold in auction by the customs authorities, it is held that the foreign exchange has not been used for the purpose for which it was acquired. The question, therefore, to be considered is whether the words ‘bringing into India any goods’ in section 8(4) of FERA requires the person acquiring foreign exchange to bring the goods into India and personally clear the same for home consumption under the provisions of the Customs Act ? In other words, the question is, whether under section 8(4) of FERA, the act of bringing the goods into India would be complete only if the goods are cleared by the person acquiring the foreign exchange ?

14. The object of section 8 of FERA is to ensure that the valuable foreign exchange is used for the purpose for which it is issued. Where a person seeks foreign exchange to bring goods into India, he is required to disclose the name of the foreign party from whom the goods are to be purchased and also disclose the rate, quantity and quality of the goods to be imported, so as to ensure that the foreign exchange is used for the purpose for which it is acquired. In the

present case, the appellant has complied with all the conditions set out in section 8(4) of FERA. However, it is held that by not furnishing Exchange Control copy of the Bill of Entry, the appellant has violated section 8(4) of FERA.

15. Section 8(4) of FERA does not require that the person acquiring the foreign exchange must furnish the Exchange Control copy of the bill of entry to establish that the goods purchased by utilising the foreign exchange has been brought into India. Therefore, it is open to the person acquiring foreign exchange to establish that the goods have been brought into India by any other means. In the present case, the goods purchased by the appellant by remitting foreign exchange have actually arrived in India and the same were cleared for warehousing. It is admitted that out of the three consignments, one consignment has been cleared by the appellant on payment of requisite customs duty and other charges. The remaining two consignments have been auctioned by the Customs / CWC as the appellant failed to clear the goods within the bond period and the authorities have recovered the customs duty and other charges payable on the two consignments. In these circumstances, it cannot be said that the appellant has failed to prove that the

goods purchased by remitting the foreign exchange have been brought into India.

16. The argument of Mr.Jetly that as per section 8 (4) of FERA, the act of bringing the goods into India would be complete only if the said goods are personally cleared by the appellant from the customs authorities cannot be accepted, because, it is not the mandate of section 8(4) that the person acquiring the foreign exchange must himself clear the imported goods. Where the goods are freely importable, the imported goods purchased from the acquired foreign exchange may be sold in high sea sale basis and the person who purchased the goods on high sea sale basis can seek clearance of the said goods. In such a case, it cannot be said that the goods purchased have not been brought into India, merely because the goods are not cleared by the person acquiring the foreign exchange. In the present case, admittedly the goods are brought into India and in the absence of any obligation to use the goods in any particular manner, clearance of the goods by the auction purchaser cannot be a ground to hold that the goods have not been brought into India. Consequently, it cannot be said that the foreign exchange has not been used for the purpose for which it was acquired.

17. In the result, the appeal succeeds. It is held that the foreign exchange acquired by the appellant has been used for the purpose for which it was acquired and, therefore, there is no violation of section 8(4) of FERA. Consequently, order of the Tribunal sustaining penalty to the extent of Rs.2,00,000/- is set aside. The reframed question is answered in the negative and in favour of the appellant.

18. As the penalty is set aside, the respondents are directed to refund to the appellant the amount of Rs.2 lakhs deposited by the appellant, within 8 weeks from today. The appeal is disposed of in the above terms with no order as to costs.

(DR.S.RADHAKRISHNAN, J.)

(J.P.DEVADHAR, J.)